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In The

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, individually and in her official capacity as Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; RUSSELL S. GOULD, Director, California Department of Finance,

Petitioners,

v.

DESHAWN GREEN, DEBBY VENTURELLA, and DIANA P. BERTOLLT, on behalf of themselves and all others similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a State's denial to newer bona fide residents of AFDC benefits equal to those granted to longer-term residents is unconstitutional.

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STATEMENT OF THE CASE

The California statute at issue facially discriminates against new residents by restricting their maximum Aid to Families With Dependent Children ("AFDC") benefits to the level of their prior state of residence. Thus, those who have lived in California for at least one year receive AFDC benefits at a level the State deems appropriate to their subsistence requirements. But those who have lived in California less than one year, even though they are bona fide California residents, are limited to the lesser

AFDC levels they would have received in Louisiana, Oklahoma, or whatever other state they moved from. Thus, for example, a family of four could have received up to $743 per month when this case was filed if it had lived in California for more than a year, but an otherwise identical family of four would have received only up to $144 per month if it had moved to California within the previous year from Mississippi. This is so regardless of whether or not a family can survive at those levels in California, which has virtually the highest cost of living in the United States.

The district court below held that this discriminatory law was an impermissible burden on the fundamental constitutional right to freedom of travel and migration, or alternatively an irrational discrimination between two similarly situated classes of state residents in violation of the Equal Protection Clause. *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993). The Ninth Circuit affirmed summarily. *Green v. Anderson*, 26 F.3d 95, 96 (9th Cir. 1994) ("we AFFIRM [the preliminary injunction] for the reasons stated in the district court's order.").

A. The AFDC Program.

The AFDC program is a need-based program designed to provide basic financial assistance to children whose families' incomes are less than a minimum subsistence level set by the State. 42 U.S.C. §§ 602(a), 606(a), 607(a) (1994); 45 C.F.R. § 233.20(a)(3)(ii) (1993). The AFDC program is designed to encourage "the care of dependent children in their own homes or in the homes of relatives" in order "to help maintain and strengthen family life." 42 U.S.C. § 601.

Established by Title IV of the Social Security Act, AFDC "is based on a scheme of cooperative federalism." *King v. Smith*, 392 U.S. 309, 316 (1968). All states have chosen to participate. Participating states are reimbursed with federal monies for a percentage of the funds

expended for benefit payments or program administration. *Heckler v. Turner*, 470 U.S. 184, 189 (1985). In return for the federal funds, states must provide aid and services in accordance with federal law. *See, e.g., King v. Smith*, 392 U.S. at 316-17. Petitioner California Department of Social Services administers the AFDC program in California. Cal. Welf. & Inst. Code § 10600 (West 1991).

B. The California Statute.

Section 11450.03(a) of the California Welfare and Institutions Code, the statute at issue in this case, provides that:

> Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

(West Supp. 1994). The "maximum aid payment" ("MAP") is the most a family with no income may receive. In California, even the maximum AFDC payments provided to long-term residents are insufficient to meet what the state Legislature has determined is the minimum basic standard of adequate care in California. Cal. Welf. & Inst. Code §§ 11450, 11452, 11453 (West Supp. 1994); JA 89-90, ¶¶ 21-22. In forty-six other states, the MAP was even lower, and in seventeen states and territories more than fifty percent lower. JA 54-55, 88. Under the California statute, however, an otherwise eligible family that has not yet lived in California for a year is limited to the AFDC grant it would have received in the state from which it just migrated, regardless of how much lower

both the cost of living and the AFDC grant levels were in the former state.[1]

1. The Purpose of the Statute.

The statute was pointedly intended to discourage poor families in need of welfare benefits from moving to California. As the district court noted, "unless the purpose here is to deter migration, there is no other rational basis for the distinction drawn among applicants all of whom are California residents." 811 F. Supp. at 523. The district court found that "such a purpose is inherent in a two-tier benefit structure" that "affects only the benefits of new residents" rather than "cutting all recipients' benefits equally." *Id.* at 522 n.14. As the district court found further, the legislative history of the statute fully confirms these necessary inferences from the statute's plain text. *Id.* ("There is evidence in the record to support the conclusion that the purpose of § 11450.03 was to deter migration of indigents."). The State's representations during the initial stages of this litigation likewise reinforce that history.

a. The Governor's Proposal.

The statute had its origins in a ballot initiative introduced by Governor Pete Wilson on December 10, 1991. *See* Vlae Kerschner, *Big Drive to Cut Welfare: Wilson Plans Initiative for 1992 Ballot*, S. F. Chron., Dec. 10, 1991, at A-1, col. 1; *accord* JA 99. The Governor campaigned publicly

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[1] Contrary to the State's implication (Pet. Br. at 16 n.6), there is a relationship between these levels and a state's cost of living. As uncontroverted expert testimony below explained, need standards "provide a useful measure of the costs of living from state to state, since they represent a state's judgment about the minimum income level a family with children needs to obtain basic necessities." JA 90. While benefit levels may be below the need standard, they must bear some rational relationship to it. 45 C.F.R. §§ 233.20(a)(2)(ii),(a)(3)(vii) (1993).

for the ballot initiative as a measure to keep poor people in need of welfare from coming to California. *See, e.g.*, JA 20, 24, 61. Literature encouraging voters to place the proposed initiative on the November 3, 1992 ballot described its objective as to "**STOP** out of state welfare recipients from moving to California just to increase their grants." JA 20 (emphasis in original).

Campaign materials favoring the measure proclaimed the same purpose. For example, a widely distributed "fact sheet" stated that the proposition "**LIMITS WELFARE PAYMENTS TO NEWCOMERS** – To reduce any incentive to come to California solely for higher welfare benefits." JA 24 (emphasis in original). In the official ballot argument on behalf of the initiative, Governor Wilson declared that "people move to California to collect welfare," and that "[n]ew state residents would receive no more in welfare here than in their home state, to end California's status as a welfare magnet." JA 61; *see also* Reynolds Holding, *Wilson's 25% Cut: Legal Attack Planned on Welfare Crackdown*, S.F. Chron., Jan. 24, 1992, at A-12, col. 2 (quoting Kassy Perry, Associate Secretary for Public Affairs at the state Health and Welfare Agency, as stating "we are providing a disincentive for people to come to California just to take advantage of welfare").

While arguing for the measure as a ballot initiative, Governor Wilson also presented it in virtually identical terms to the State Legislature as part of his budget package. JA 20, 25. The Governor's legislative proposal was introduced and carried for him by Assembly members from his political party. JA 26, 28. It was meant to implement the same proposal contained in his ballot initiative. JA 25-28, 36, 38, 40, 45, 53, 58, 63, 99, 100, 107-109.[2]

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[2] Because the two measures were treated as interchangeable by both the State and the federal government, all agency documents provided that the initiative would supersede the legislation should the initiative be approved. JA 45, 53, 58, 63.

b. The Legislative Debate.

The legislative history of the predecessor bill to the statute also demonstrates that the animating purpose behind the residency requirement was to inhibit free interstate migration.[3] The district court summarized that record as follows:

> . . . on March 9, 1992, the California State Assembly adopted Senate Bill ("SB") 366, a legislative proposal which contained language nearly identical to that contained in § 11450.03 (the sole substantive difference was the use of "could" in SB 366 instead of "would"). Assembly member Costa was the principal Assembly author of that measure. During the debate on the Assembly floor, Mr. Costa stated:
>
> > Realizing that in fact funds are short in California today, it makes a great deal of sense then to insure that incentives are provided for people from other parts of the country . . . that might be lured to California . . . for that purpose – to benefit from higher assistance. This legislation attempts to take care of that by requiring a one year residency requirement in California. . . .
>
> Pls.' Ex. 11, 15:17-26. The provisions of SB 366 were reflected in the Assembly's Budget Bill, Assembly Bill ("AB") 2303, and eventually enacted by the Legislature in SB 485. McKeever Decl., ¶ 12.

Green, 811 F. Supp. at 522 n.14; *see generally* JA 99-113 (tracing legislative history of predecessor bill).

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[3] As the district court noted, "[t]he legislative history of predecessor bills is relevant to discerning the legislative intent of a later enactment." *Green*, 811 F. Supp. at 822 n.14, citing *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2595 (1992).

Both opponents and proponents of the measure sounded the same theme throughout the legislative debate:

> This bill sends a message that says if you're poor, [you're] down trodden, California doesn't want you. We don't want you to come here, we want you to go someplace else, the land of opportunity is not a land of opportunity for people who are poor.

JA 32 (remarks of Assemblyman Bates).

> It's certainly debatable whether the westward migration is in fact fueled by California as a welfare magnet. I doubt that's the case but nonetheless the passage of this Bill would certainly lay to rest that question and I would urge an aye vote on the Bill before us today.

JA 39 (remarks of Assemblyman Gotch).

> I rise to support this measure . . . [I]t is a legitimate response to the concern . . . that California has become a welfare magnet and that people have come to this state because they see it as an opportunity to max out their welfare level of subsistence for themselves and those they support. . . . So this is a measure that makes sense. It is part of a proposal that the Governor is putting on the ballot.

JA 39-40 (remarks of Assemblyman Wyman).

The proposed measure passed and was incorporated into the final budget health and welfare trailer bill, SB 485, which was adopted by the state Legislature on September 2, 1992. JA 104, 109. Governor Wilson signed the legislation into law on September 14, 1992. JA 104.

c. The Federal Waiver Application.

Shortly after enactment, the State reiterated its purpose to discourage migration to California by indigents in

its application for the federal waivers necessary to implement the law.[4] Three days after the Governor signed the measure into law, then Secretary for the California Health and Welfare Agency, Russell S. Gould, lodged the State's waiver request with the Secretary of HHS. CR 69, Ex. 12 at 1, 4.[5] As he had in his earlier letter requesting a waiver from the federal government for the ballot initiative, he defined the intent of the residency requirement in language nearly identical to that found in the Governor's campaign materials. CR 69, Ex. 8; JA 44-51. The waiver requests underscored once more the objective of "reduc[ing] the incentive for families to migrate to California for the purpose of obtaining higher aid payments." JA 44-45.

The State indentified no other objective in its forty-six page waiver request. CR 69, Ex. 12. Instead, the document repeatedly emphasized that discouraging migration into California was the plan's sole purpose. *See, e.g., id.* at 47, 48 ("The purpose of this proposal is to reduce the incentive for families to move to California to receive public assistance."), 50 (same, appearing here under heading "OBJECTIVE").

Similarly, in a separate case involving a procedural challenge to the waiver, *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994), the State represented that "California sought

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[4] Without federal government approval, the statute would have violated federal law requiring certain minimum grant levels and prohibiting unequal treatment by virtue of residency. The Secretary of Health and Human Services ("HHS"), however, is authorized to waive the federal requirements in the case of experimental projects. 42 U.S.C. § 1315(a) (1994). Accordingly, Section 11450.03(b) provided that the residency restrictions would become operative only upon approval by the Secretary of HHS.

[5] Citations to "CR" are to the District Court Clerk's Record, portions of which were reproduced in Appellees' Supplemental Excerpts of Record, Volumes I (CR 69) and II (CR 10, 35, 37), filed in the Ninth Circuit on June 18, 1993.

the waiver to allow different grant levels for newly arrived AFDC recipients on the basis that it would reduce the incentive for families to migrate to California for the purpose of obtaining higher payments." JA 121-122. In *Beno*, the same Ninth Circuit panel that affirmed the district court's findings here stated that the residency provision "aim[ed] to discourage poor families from moving to California by limiting recent entrants' AFDC benefits to the amount received in their state of former residence". *Beno*, 30 F.3d at 1061. Once more, no other purpose for the law was identified. In its most recent, post-*Beno* waiver request – dated August 1994 and still pending before the Secretary of HHS – the State once again described the statute's goal as "to reduce the incentive for families to move to California to receive public assistance." *See* August 1994 California Waiver Request, at p. 27; *accord, id.* at pp. 37-38.[6]

d. The State's Representations in this Litigation.

During the initial stages of the proceedings below, the State repeatedly reiterated the statute's exclusionary purpose. For example, on the day this action was filed, Petitioner Anderson, Director of the California Department of Social Services, issued a news release admitting that the measure aimed to "discourag[e] people from coming to California just for higher welfare benefits." JA 93. Furthermore, in the State's brief opposing the temporary restraining order, it listed "among the bases for implementation of the statute: 'to prevent California from being a magnet for people seeking to increase the level of their public assistance benefits by moving to California.' Def. Opp'n to TRO, December 21, 1992, 3:16-19." *Green*, 811 F. Supp. at 522 n.14.

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[6] Twelve copies of the post-*Beno* August 1994 California waiver request were lodged with the Clerk's Office on December 13, 1994.

2. The Effect of the Statute.

Just as the record below demonstrates only one statutory purpose, it similarly demonstrates that the statute has certain predictable effects. As intended, it discourages families from migrating to the state, or penalizes them once they get there, by depriving them of the same level of public support for the basic necessities of life that California affords to its longer-term residents. It does so even if they do not need AFDC upon arrival, but should come to need such support at any time during their first year of residence.

As the district court found, the statute thus "materially diminishe[d]" Plaintiffs' subsistence level benefits. *Green*, 811 F. Supp. at 521. Moreover, as the trial court further found, "the measure cannot fairly be said to provide the same payment as new residents could have received in the state of their prior residence since the cost of living, particularly housing, varies so substantially from state to state and generally is much higher in California than elsewhere." *Id.* In particular, the trial court found that "[a]ll of plaintiffs have been unable to locate housing in California that is affordable to them on the reduced AFDC payment" afforded them by the statute. *Id.* at 523.[7] The record amply supports the trial court's

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[7] The State contends that because Plaintiffs might receive some other benefits, depriving them of standard AFDC benefits should be discounted. *E.g.* Pet. Br. at 16-17. This argument is meritless. First, the only other cash benefit the State cites, namely homeless assistance, is dependent on the amount of the recipients' AFDC benefits. JA 66, 70, 71-72; Cal. Welf. & Inst. Code § 11450(f)(2)(B) (West Supp. 1994). Families like Plaintiffs' who cannot locate housing in California that is affordable to them on their former state grant levels are unable to utilize homeless assistance for more than two weeks. *Id.* Second, neither Food Stamps nor Medicaid benefits can be used to pay for housing. Third, as eligibility requirements for Food Stamps and AFDC differ, not all newcomer families who are eligible for

factual findings, which the State has not contested either before the Ninth Circuit or before this Court.

a. DeShawn Green.

For example, Plaintiff Green was about to be homeless the day the temporary restraining order was issued in this case. JA 71-72, 96. Although she could find housing for her family of three in California on the California grant level of $624 a month, she could not find housing in California on the Louisiana assistance level of $190 a month she would have received under the statute. JA 72.

Ms. Green had originally lived in California for twelve years before moving to Louisiana with her mother in 1985. JA 71. While in Louisiana, she had two children who were three and four years old at the time this case was filed. *Id.* Her son has sickle cell anemia. *Id.* The children's father severely abused Ms. Green and was arrested several times for beating her. *Id.*

Ms. Green escaped with her children to California where her mother now lived. *Id.* When Ms. Green arrived, however, she discovered that her mother was homeless and could not offer her the shelter and protection she had expected. *Id.* Ms. Green had to spend the little money she had on a hotel room. *Id.* Three days later she was out of money and had no choice but to apply for homeless assistance and AFDC. *Id.*

The homeless assistance enabled Ms. Green to stay in a motel for two weeks. *Id.* To receive further homeless assistance, Ms. Green had to find an apartment she could rent for no more than 80% of her monthly AFDC grant. JA 71-72. Ms. Green searched for an apartment. JA 72. However, while she found a number of options at 80% or less of the California grant level of $624 a month, she

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AFDC will be eligible for Food Stamps. Finally, none of the benefits cited by the State can be used to pay for such necessities as utilities, clothing, laundry, diapers, transportation, and the like.

could find nothing even close to the Louisiana level of $190 per month, much less 80% of that. *Id.*

As a result, but for the issuance of the TRO in this case, Ms. Green and her children would have been on the streets without even a car to sleep in. *Id.* Ms. Green knew no one who could lend her money for an apartment. *Id.* She had never lived anywhere besides California and Louisiana. *Id.* She was afraid to go back to Louisiana for fear of her children's father, and could not have afforded transportation back even had she wanted to return. *Id.*

b. Debby Venturella.

Plaintiff Venturella would have been in Ms. Green's situation absent the preliminary injunction. Although the Oklahoma monthly assistance level of $264 for two or $341 for three would have enabled her to secure housing in Oklahoma, she could not find housing in California for those amounts. JA 76.

Like Ms. Green, Ms. Venturella came to California to escape domestic abuse. JA 75. When she left Oklahoma, she was pregnant with her second child. JA 74, 75. Her only relatives lived in California, including her mother, who was born and raised in California. JA 75. Although Ms. Venturella and her child were able to stay with relatives temporarily, they did not have room for her to stay longer and could not afford to help her to live elsewhere. JA 75-76. Ms. Venturella was seven months pregnant, and her previous pregnancy had involved complications which prevented her from working. JA 76. As a result, Ms. Venturella had no choice but to apply for AFDC assistance. *Id.*

Since she had never received AFDC before, Ms. Venturella had no idea what either the Oklahoma or California grant levels were. *Id.* She learned that she was to receive the Oklahoma grant level of $264 per month for two, and then $341 per month once her baby was born. *Id.* Although she could have found an apartment in Oklahoma for $199 per month, she could find nothing in

California that she could afford on the Oklahoma grant level. *Id.* But for issuance of the preliminary injunction in this case, she would have lost the apartment her relatives helped her obtain but could not afford to help her maintain. JA 76-77.

c. Diana Bertollt.

Plaintiff Bertollt faced a similar predicament. She had come from Colorado with her infant son because she feared for her and her son's safety at the hands of his abusive father. JA 78. She and her family believed that she would not be safe from her son's father in Colorado for at least a year. JA 80. She came to California because she had an uncle in California with whose family she could stay temporarily. *Id.*

Since there was not enough room for her to stay with her uncle's family permanently, she had to apply for AFDC for herself and her son. JA 78. She had no job skills as her son's father's abusive behavior had prevented her from obtaining training or experience. JA 80. Welfare officials informed her she would receive the Colorado grant of $280 per month instead of the California grant of $504 per month. JA 79. She could find no apartment in California at the Colorado grant amount. JA 81. She too was afraid she would become homeless. *Id.*

d. Expert Testimony.

Uncontroverted expert testimony before the district court demonstrated that these three families' harsh predicaments were the inevitable consequence of California's discriminatory residency requirement:

> The costs of living in California are among the highest in the nation. This can be demonstrated by examining differences in housing costs, typically the largest budget expense for AFDC families . . .

> . . . California's housing costs are higher than in any other state with the possible exception of Massachusetts . . .
>
> Because California's housing costs are so high, the residency requirement will place recently arrived AFDC families on an inferior footing relative to AFDC recipients in the state from which the newcomers recently moved. In all but one of the 46 states (including the District of Columbia as a state) in which AFDC benefit levels are lower than in California, the average statewide costs of modest housing are also lower than in California. This means that newly entered residents from 45 of these 46 states typically will face higher costs of living without any increase in their AFDC benefits to help meet those costs.

JA 87, 88.[8] As a consequence, for example, a newcomer family of four living in California, but previously from Mississippi, would receive assistance of only $144 per month, which is $599 per month less than an otherwise identical family of longer term residency in California would receive, an 80% reduction to a sum which does not remotely approach the amount necessary to secure housing in California. JA 54, 68, 72, 76, 81. Accordingly, the expert concluded, "[t]he reduced grants can be expected to force some newcomer AFDC families to move into overcrowded or substandard quarters, or . . . even to become homeless, all of which can pose significant health and safety risks to residents, especially children." JA 89.

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[8] Housing costs are an appropriate gauge of the cost of living for poor people because the poor spend such a substantial share of their income for housing. In 1989, 56% of all poor renters and 74% of unsubsidized poor renters spent at least half of their income for rent and utilities. Edward B. Lazere, et al., *A Place to Call Home: The Low Income Housing Crisis Continues*, 6, 7 (December 1991). *See* JA 87.

C. The Status of the State's Federal Waiver Request.

Although the Secretary of HHS approved the State's waiver request, *see* Part B.1.c. *supra*, on October 29, 1992, and California began implementing the provision on December 1, 1992, the Ninth Circuit vacated this approval in *Beno v. Shalala*, 30 F.3d 1057. *Beno* held that one of the waivers necessary to implement the residency provision was invalid because the Secretary had failed to consider public comments objecting to the proposed experiment.[9] After the Ninth Circuit denied the State's petition for rehearing in *Beno*, neither the State nor the Secretary of HHS petitioned this Court for review. Although the State submitted a new waiver request, the Secretary of HHS has not approved it. The State acknowledges, as it must, that in the absence of the waiver, the statute cannot be implemented, Pet. Br. at 5 n.3, raising the issue of whether this case is moot.

SUMMARY OF ARGUMENT

California's statute, enacted with the unconstitutional purpose of deterring in-state migration, impermissibly treats new bona fide residents as second-class citizens by denying them AFDC benefits equal to those granted to longer-term California residents who are otherwise equally needy. Two families with identical needs, identical resources, and identical numbers of hungry mouths to feed are granted different amounts of money solely because one of them has recently moved across state lines.

This discrimination is unconstitutional. The fundamental right of interstate travel and migration forbids a

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[9] For example, the *Beno* court noted that "the Secretary. . . approved cuts of up to 80% to recent entrants . . . without examining any data about the cost of living in California or other issues relevant to [a determination of whether the experiment posed a danger to human subjects.] *Beno*, 30 F.3d at 1076.

state from treating new residents differently from old residents in order to discourage their entry or to penalize them for their entry if they cross state lines anyway. Depriving new residents of basic subsistence payments that are granted to longer-term residents constitutes such a penalty on the right to travel and deterrent to its exercise. Thus the only question in this case is whether the State may escape its constitutional obligation to treat new and old residents equally where it grants new residents the dollar amount of AFDC benefits they would have received in their prior state of residence.

The answer must be no. Under this Court's governing precedents barring discrimination against those who migrate across state lines, the California law is subject to exacting scrutiny for any of three reasons. First, it was enacted with an avowed purpose long deemed invalid by this Court: the purpose of fencing out needy indigents. Second, it penalizes the exercise of the right to travel by depriving newer families of the ability to obtain basic necessities for survival. As the district court found, granting new indigent residents AFDC benefits at the level of their prior state of residence affords them a fraction of the AFDC benefits a longer-term Californian in identical circumstances would have received – up to 80% less, if one migrates from Mississippi, or 45-70% less if one migrates from Louisiana, Oklahoma or Colorado as Plaintiffs did. Third, the California statute thus has, as intended, a powerful deterrent effect on interstate movement.

Accordingly, the statute is subject to strict scrutiny, which it cannot survive. Its goal of fencing out indigents is impermissible. And had the Legislature genuinely intended to save money by the residency provision, as the State now argues, far less discriminatory means were available: the claimed savings from this provision amount to the equivalent of only 76 cents per existing AFDC recipient per month.

Even if the statute were deemed not to trigger strict scrutiny by impermissibly burdening the right to travel, it nonetheless violates the Equal Protection Clause under

rationality review. For no permissible rational basis supports the distinction between new residents and old residents or the distinctions among new residents that California has drawn based upon prior states of residence. As the district court found, new residents do not have lesser needs than longer-term residents. Nor do new residents migrating from Mississippi need 80% less to live in California than new residents migrating from Alaska. This Court's precedents make clear that, even if saving money is a permissible goal, it may not be realized on the backs of new residents alone.

Finally, the California law also violates the Privileges and Immunities Clause of Article IV because it unjustifiably discriminates against new bona fide residents by treating them as Louisianians, Oklahomans, or other out-of-staters rather than as citizens of California.

This Court need not reach the merits of these questions, however, as the case is moot. Since the ruling below, the Ninth Circuit, in a separate action, has vacated one of the federal waivers necessary to implement the state law. Thus, no live case or controversy now exists and the case should be dismissed as moot.

ARGUMENT

I. THE CALIFORNIA STATUTE IMPERMISSIBLY DISCRIMINATES AGAINST NEW STATE RESIDENTS, IN VIOLATION OF THE EQUAL PROTECTION CLAUSE AND THE FUNDAMENTAL RIGHT TO TRAVEL.

As this Court has long held, our Constitution was "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. Seelig*, 294 U.S. 511, 523 (1935) (Cardozo, J.). Accordingly, it is also well settled that "the right of free ingress into other States, and egress from them." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869). This right to travel from one state to another "occupies a position

fundamental to the concept of our Federal Union" and "has long been recognized as a basic right under the Constitution." *United States v. Guest*, 383 U.S. 745, 757-58 (1966); *see id.* at 758 ("a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created").[10]

The principle of freedom of interstate travel and migration is thus an integral part of our federal system, and has received this Court's "unquestioned historic acceptance." *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (plurality opinion). It is a fundamental structural postulate of our Constitution. *See id.* (right to travel may be "inferred from the federal structure of government adopted by our Constitution"). It is embodied in this Court's longstanding construction of the Equal Protection Clause to bar discrimination against new state residents. And various members of this Court

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[10] As explained early on by this Court:

> For all the great purposes for which the Federal government was formed we are one people, with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own states.

Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 48-49 (1868), (quoting from *The Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting)); *see also Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Edwards v. California*, 314 U.S. 160, 173-74 (1941); *Kent v. Dulles*, 357 U.S. 116, 126 (1958); *Shapiro v. Thompson*, 394 U.S. 618, 629-31, 634 (1969); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254 (1974); *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 901-03 (1986).

have found it reflected in other provisions of the Constitution as well.[11]

In keeping with this principle, no state may erect a wall at its borders to screen out citizens of other states. Nor may any state erect an invisible wall against interstate migration in the form of discriminatory treatment of newcomers upon arrival. As the plurality in *Soto-Lopez* observed, this Court has long protected new residents of a state "from being disadvantaged, or from being treated differently, simply because of the timing of their migration." *Soto-Lopez*, 476 U.S. at 904 (citing *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 n.6 (1985); *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982); *Memorial Hospital v.*

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[11] For example, the freedom of interstate travel or migration has been rooted in the Privileges and Immunities Clause of Article IV, *see, e.g., Zobel v. Williams*, 457 U.S. 55, 71 (1982) (O'Connor, J., concurring in judgment) (privileges and immunities analysis "supplies a needed foundation for many of the 'right to travel' claims discussed in the Court's prior opinions"); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869) ("[W]ithout some provision of the kind . . . the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."), in the Commerce Clause, *see Edwards v. California*, 314 U.S. 160, 172-74 (1941), in the Privileges and Immunities Clause of the Fourteenth Amendment, *see Edwards*, 314 U.S. at 178-79 (Douglas, J., concurring); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908), and in the Fifth Amendment, *see Kent v. Dulles*, 357 U.S. 116, 125-126 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment. . . . [T]hat right was emerging at least as early as the Magna Carta. . . . Freedom of movement across frontiers. . . , and inside frontiers as well, was a part of our heritage. . . . Freedom of movement is basic in our scheme of values."); *see also* William Cohen, *Equal Treatment for Newcomers: The Core Meaning of National and State Citizenship*, 1 Const. Comm. 9, 17 (1984) (locating prohibition on discrimination against new state residents in the Citizenship Clause of the Fourteenth Amendment).

Maricopa County, 415 U.S. 250, 261 (1974); *Shapiro*, 394 U.S. 618, 620 n.3 (1969)). Accordingly, this Court has generally subjected such discrimination against new state residents to the strictest scrutiny under the Equal Protection Clause. "[A]ny classification which serves to penalize the exercise of th[e] right [to travel], unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (emphasis in original).

Under this exacting standard, this Court has consistently struck down durational residency requirements with respect to benefits that support the basic necessities of life. In *Shapiro v. Thompson*, the Court invalidated state denial of welfare assistance to residents who had not yet lived for a year within the state. And in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), the Court invalidated state denial of publicly funded non-emergency medical care to residents who had not yet lived for a year within the state. As the Court later noted in *Maher v. Roe*, 432 U.S. 464 (1977), *Shapiro* and *Maricopa County* "recognized that denial of welfare to one who had recently exercised the right to travel across state lines was sufficiently analogous to a criminal fine to justify strict judicial scrutiny." *Id.* at 474 n.8. *See also Dunn v. Blumstein*, 405 U.S. 330, 339-60 (1972) (invalidating one-year residency requirement for voting).

Even where this Court has declined to reach strict scrutiny, it has nonetheless invalidated, as offensive to Equal Protection, state schemes that make public benefits dependent upon the timing of one's residency in the state. In *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), for example, this Court struck down as irrational a New Mexico law granting a tax exemption to Vietnam veterans only if they had resided in the state prior to a specified date. And in *Zobel v. Williams*, 457 U.S. 55 (1982), this Court invalidated as irrational an Alaska statute that distributed income from natural resource development to state residents based upon the year in which they had established residency in the state.

The State does not question the existence of the fundamental principle of free interstate migration, nor does it seek to overturn any of this well-established law.[12] Rather, the State's argument stands or falls on the proposition that California does not "discriminate" against or "penalize" new state residents as did the states in these prior cases, because California provides new residents

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[12] While the State makes no such radical argument, one amicus curiae supporting the State goes so far as to urge that *Shapiro v. Thompson* and its progeny be overruled. *See* Pacific Legal Foundation ("PLF") Br. at 20-22. *Stare decisis* plainly precludes this result. As this Court reiterated only three Terms ago, "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808 (1992).

Nor is there reason for any exception to *stare decisis* here. *See id.* at 2808-09. First, *Shapiro* has in no sense proven "unworkable" in practice, as this Court and the lower federal and state courts have relied on its principles routinely and without any difficulty. Second, for a quarter century, those who would migrate across state lines "have relied reasonably on [*Shapiro*'s] continued application." *Id.* at 2809. They "have ordered their thinking and living," *id.*, around the constitutional promise that they need not be "poverty-bound to the place where [they have] suffered misfortune," *Edwards v. California*, 314 U.S. at 185 (Jackson, J., concurring), but instead might seek a better life for themselves and their families in states with better opportunities.

Third, "no evolution of legal principle has left [*Shapiro*'s] doctrinal footings weaker than they were in [1969]." *Casey*, 112 S. Ct. at 2810. The fundamental principle that we "sink or swim together" has in no way attenuated over time. Finally, time has not eroded *Shapiro*'s factual assumptions. Interstate mobility without loss of potential subsistence benefits is at least as crucial to the efficient allocation of labor today as it was in 1969, if not even more so in light of increasing competition in the global economy. In short, "the sum of the precedential inquiry . . . shows [*Shapiro*'s] underpinnings unweakened in any way affecting its central holding." *Id.* at 2812.

some welfare benefits in an amount equal to AFDC levels in their prior states of residence – however inadequate those funds might be for a family's survival in California.

The State's argument is wholly fallacious and should be rejected by this Court. First, the California statute implicates the right to travel as surely as the laws struck down in *Shapiro* and its progeny. Here as in *Shapiro*, the state purposely seeks to drive away migrating indigents from its doors. Here as in *Shapiro*, it does so by denying new residents the basic necessities of life – that is, the level of assistance the state Legislature has deemed appropriate for subsistence in California.[13] Here as in *Shapiro*, the statute's effect is to deter the migration of poor families to the state who would otherwise come for reasons unrelated to the receipt of welfare assistance, and to penalize those who must come anyway. Thus, here as in *Shapiro*, the State's deliberate discrimination against indigent newcomers must be subjected to strict scrutiny, which it cannot survive. *See* Parts I.A and I.B, *infra*. Second, even if strict scrutiny were not applied, the California statute violates the Equal Protection Clause because it draws a distinction between new and old residents, and further distinctions among new residents, that bear no rational relationship to any permissible state goal, including fiscal need. *See* Part I.C, *infra*.

A. The Statute Triggers Strict Scrutiny.

This Court has held that a state law triggers strict scrutiny when it implicates the fundamental right to travel in any one of three ways: (1) "when impeding [interstate] travel is its primary objective"; (2) "when it uses any classification which serves to penalize the exercise of that right"; or (3) "when it actually deters such travel." *Soto-Lopez*, 476 U.S. at 903 (citations and internal

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[13] The denial in *Shapiro* was not in all instances total either; as this Court pointed out, two of the three states there offered "partial assistance." *Shapiro*, 394 U.S. at 635.

quotations omitted); *accord id.* at 920-21 (dissent). While any one of these features is sufficient to require strict scrutiny, the California statute suffers from all three.[14]

1. The statute aims at inhibiting interstate migration.

This Court has repeatedly recognized that a law enacted for the purpose of inhibiting migration into the state is virtually *per se* unconstitutional. *See Hooper*, 472 U.S. at 620 n.9; *Zobel*, 457 U.S. at 62 n.9; *Memorial Hospital*, 415 U.S. at 263-64; *Shapiro*, 394 U.S. at 629. "If a law has 'no other purpose than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' " *Id.* at 631 (quoting *United States v. Jackson*, 390 U.S. 570, 581 (1968)).[15]

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[14] Whether styled an infringement of the fundamental right to migrate or a denial of equal protection, once the Court has determined that a law facially discriminates against newcomers and impinges on their fundamental right to migrate in at least one of the three ways identified above, strict scrutiny is required. *Shapiro*, 394 U.S. 618; *Soto-Lopez*, 476 U.S. at 903 and n.4 (plurality); *see also id.* at 920-921 (dissent). "[T]he right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents", and as such, right to travel analysis can be considered "a particular application of equal protection analysis." *Zobel*, 457 U.S. at 60 n.6.

[15] That impermissible statutory purpose alone triggers strict scrutiny is a familiar principle in our constitutional law. *See, e.g., Church of Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217, 2227 (1993) ("if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is . . . invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest . . . "); *Arlington Heights v. Metro. Housing Corp.*, 429 U.S. 252, 265 (1977) (proof of racially discriminatory intent sufficient to trigger strict scrutiny under Equal Protection Clause); *Edwards v. Aguillard*, 482 U.S.

This Court has held such an exclusionary purpose equally forbidden when the newcomers sought to be excluded happen to be poor. "[T]he purpose of inhibiting migration *by needy persons* into the state is constitutionally impermissible." *Shapiro*, 394 U.S. at 629 (emphasis added). Nor can a state save such a statute by arguing that it seeks to exclude only those incoming poor persons who are dependent on state support.[16] In *Shapiro*, the states argued that they should be free to deter "those who would enter the state solely to obtain larger benefits." *Id.* at 630. This Court expressly rejected that argument:

> a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among other factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a

578, 593-94 (1987) (purpose to promote religion renders statute presumptively invalid under the Establishment Clause); *Madsen v. Women's Health Center*, 114 S. Ct. 2516, 2523 (1994) (in determining whether a law is content-based in presumptive violation of the Free Speech Clause, "[w]e . . . look to the government's purpose as the threshold consideration.").

[16] The California statute, of course, like the statutes in *Shapiro*, is not so limited: it disadvantages *all* new families, including those like Plaintiffs' who come for reasons unrelated to the receipt of welfare assistance, and those who are not poor when they arrive but suffer misfortune during the first year.

> particular State in order to take advantage of its better educational facilities.

Shapiro, 394 U.S. at 631-632.[17]

This Court has since reaffirmed consistently that a statute intended to deter or restrict interstate migration by indigents – even those seeking social services – necessarily requires strict scrutiny. For example, in *Memorial Hospital*, the Court stated that,

> to the extent the purpose of the requirement is to inhibit the immigration of indigents generally, that goal is constitutionally impermissible. . . . Moreover, "a State may no more try to fence out those indigents who seek [better public medical facilities] than it may try to fence out indigents generally."

Memorial Hospital, 415 U.S. at 263-264 (citations omitted; bracketed phrase in original).[18]

More recently, the Court has reiterated *Shapiro*'s unconstitutional purpose doctrine even where it has not needed to rely on it to invalidate residency-based laws. In both *Zobel* and *Hooper*, the Court repeated that a "state objective to inhibit migration into the State would encounter 'insurmountable constitutional difficulties.' "

[17] Thus the constitutional right to migrate is not dependent on the immigrant's reason for migrating. Statutes that aim to reduce migration cannot be upheld on the basis that they target a subgroup of migrants based on their motivation for migrating. That is why the four amici states' distinction between those who come for higher welfare payments and those who, like Plaintiffs, come for other reasons, is legally irrelevant.

[18] *See also Memorial Hospital*, 415 U.S. at 282 (Rehnquist, J., dissenting) (distinguishing the Arizona law from one that "was specifically designed to . . . deter indigent persons from entering the State of California"); *id.* at 283 (distinguishing a "purposeful attempt to insulate the State from indigents"); *id.* at 284 ("purposeful barriers [were] struck down in *Edwards* and *Shapiro*"); *id.* at 285 ("the Court should examine . . . whether the challenged requirement erects a . . . purposeful barrier").

Hooper, 472 U.S. at 620 n.9 (quoting *Zobel*, 457 U.S. at 62 n.9 and citing *Shapiro*, 394 U.S. at 629). *See Soto-Lopez*, 476 U.S. at 903 (plurality); *id.* at 920-22 (dissent).

In this case, the Court need look no further than the face of the statute in order to find that it is impermissibly aimed at discouraging indigents from migrating to California. As the district court found, no other purpose could logically explain the distinctions the statute draws. If one does look further, the evidence of this purpose is overwhelming. The State has consistently and proudly proclaimed that the statute was passed in order to discourage and prevent poor families from settling in California, throughout both the statute's legislative history and the State's early representations in this case. Indeed, this purpose was the very selling point in its enactment. *See* pages 4-9, *supra*.[19]

Before this Court, the State does not contend that its statute could survive constitutional challenge if passed for the purpose of deterring interstate migration. Rather the State attempts a last-minute rewrite, claiming that the statute was actually passed for some other purpose than discouraging indigents from entering the state. The State now says that it was merely aiming at "lower[ing] state welfare expenditures" in a time of "worsening budget problems," and engaging in an "experiment in welfare reform" in order to "inform[ ] future decision-making." Pet. Br. at 18-19.[20]

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[19] *See also Green*, 811 F. Supp. at 522-23 & n.14. Because the district court found that the statute penalized new residents, it did not need to make further detailed findings as to the statutory purpose. If any dispute remains about the purpose of the statute, the proper procedure would be to remand the matter to the district court for further findings.

[20] The State only once in its brief reveals the true purpose of the residency requirement: it details the migration data it plans to gather through implementation of the statute, belying the contention that the residency requirement is without any purpose to deter migration. Pet. Br. at 22 n.10.

The State's attempt to rewrite history here is disingenuous at best. The record below is rife with admissions of the State's exclusionary purpose, which is in any event apparent on the statute's face. And no alternative purpose is plausible.[21] Federal law does not recognize benefit reductions solely to save funds with no other purpose as warranting a waiver from the Secretary of HHS. *See Beno*, 30 F.3d at 1069. ("The [waiver] statute was not enacted to enable states to save money. . . . "). In any event, it surely takes no "experiment" to determine that granting newcomers lower benefits than longer-term California residents will save money. Accordingly the State has consistently declined in its waiver requests to describe its statute as aimed merely at saving money.[22]

Even if saving money were a genuine *additional* purpose of the statute, it could not cleanse the record of the purpose to deter migration. The purpose of the statute to discourage migration cannot be made to disappear. If the state is "experimenting" in "reducing expenditures," it is

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[21] At the same time the Legislature passed the residency provision it also passed a general grant cut which the State describes as a work incentive program in the waiver request. Cal. Welf. & Inst. Code § 11450.01 (West Supp. 1994); CR 69, Ex. 12. Had the purpose of the residency provision not been to deter migration, there was no need for separate provisions – it could have simply increased the State's portion of the general grant cut by but 76 cents per recipient. *See* n.32, p. 40, *infra*.

[22] In its waiver requests, the State described the statute instead as a "project" designed to "reduce the incentive to migrate to California solely to seek higher public assistance benefits". JA 47; *see* JA 48, 50, 59, 121-122. The State cannot have it both ways. Either the statute was intended to deter migration, subjecting it to strict scrutiny in this case, or it was enacted only to save money, which is insufficient to sustain the waiver necessary to implement it.

doing so, impermissibly, solely on the backs of newcomers to the state. States are surely free to experiment with policies – including policies that save money – but not with our liberties or with the structural postulates of the Constitution. Economic secession from the union is not a constitutionally permissible experiment.

Put another way, if the State here is seeking any permissible fiscal ends, it is doing so by the impermissible means of discrimination against new state residents. This Court has easily seen through state attempts at dressing up economic protectionism as good social policy in the related context of dormant Commerce Clause litigation. As the Court has consistently noted, " 'the evil of protectionism can reside in legislative means as well as legislative ends.' " *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 112 S. Ct. 2019, 2024 (1992) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978)). A protectionist statute might aim to " 'assure a steady supply of milk,' " or " 'to reduce waste disposal costs,' " in addition to aiming at favoring insiders over outsiders. *Id.* But the Court has never hesitated to strike such statutes down, notwithstanding that they aimed at permissible as well as impermissible goals.[23]

In short, even "a presumably legitimate goal" cannot save a statute that employs the "illegitimate means of

[23] The Court has likewise consistently struck down taxes that discriminate against interstate commerce, "even where such tax was designed to encourage the use of ethanol and thereby reduce harmful exhaust emissions, . . . or to support inspection of foreign cement to ensure structural integrity" – again, benign aims that may not be advanced solely at outsiders' expense. *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2013 (1992) (citing *New Energy Co. v. Limbach*, 486 U.S. 269, 279 (1988) and *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 379-80 (1939)).

isolating the State from the national economy." *Philadelphia v. New Jersey*, 437 U.S. at 627. Here too, the State's discriminatory "experiment" in isolating itself from national poverty is impermissible. This Court has long condemned "parochial legislation" even if its "ultimate aim" was "to preserve the State's financial resources from depletion by fencing out indigent immigrants." *Id.* at 626-27 (citing *Edwards v. California*, 314 U.S. 160, 173-74 (1941)). If the State wishes to "experiment" in reducing welfare expenditures, it is constitutionally free to do so, as long as it reduces them equally for newcomers and oldtimers alike, or provides incentives for oldtimers as well as newcomers to seek employment.[24] But it may not seek to save money by deliberately driving new residents away. The California statute must be strictly scrutinized because it is inexorably tainted with the purpose of deterring migration.

2. The statute penalizes families for having exercised their right to migrate interstate.

Even absent an intent to deter interstate migration, state laws are subject to strict scrutiny if they penalize those who have exercised their right to migrate interstate solely on account of the exercise of that right. *See, e.g., Dunn*, 405 U.S. at 338; *Memorial Hospital*, 415 U.S. at 258; *Soto-Lopez*, 476 U.S. at 903; *accord id.* at 920-921 (dissent). The California statute plainly penalizes newcomer families solely on account of their recent move to the state.

By definition, the California statute, like all durational residency restrictions, "impos[es its] prohibition on

[24] *See* Pet. Br. at 20 (discussing "work incentives" claimed to result from across-the-board grant cuts). There is, of course, no rational basis to impose work incentives only on new residents, as this Court specifically held in *Shapiro*. 394 U.S. at 637-638.

only those persons who have recently exercised [the] right" of interstate travel. *Dunn*, 405 U.S. at 341-42. Only recent migrants – those who have lived in California less than a year – are denied California's level of AFDC benefits. The California law thus disadvantages certain residents or treats them differently from similarly situated residents, "simply because of the timing of their migration." *Soto-Lopez*, 476 U.S. at 904.

Nor is this discriminatory disadvantage a trivial one. Even assuming that not all waiting periods for public benefits are "penalties" on the right to migrate, *see Memorial Hospital*, 415 U.S. at 258, and that a deprivation of benefits must have some minimum amount of impact in order to constitute such a penalty, California's durational residency statute plainly crosses that threshold because it deprives newcomers of a "basic necessity of life." *Id.* at 259. A law constitutes a penalty on migration, this Court has repeatedly stated, if it deprives new residents of vital governmental benefits or services. Distinguishing less essential government benefits such as in-state university tuition and licenses to practice a profession, hunt or fish, this Court concluded that "the right of interstate travel must be seen as insuring new residents the *same* right to *vital* government benefits and privileges in the states to which they migrate as are enjoyed by other residents." *Id.* at 261 (emphasis added). "Governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements." *Id.* at 259 (listing cases).

AFDC assistance falls well within the borders of this "vital service" category. In *Shapiro*, this Court observed that welfare is "aid upon which may depend the ability of the families to obtain the very means to subsist – food, shelter, and other necessities of life." *Shapiro*, 394 U.S. at 627. As then-Justice Rehnquist recognized, there is "virtual denial of entry inherent in denial of welfare benefits

– 'the very means by which to live,' *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970)." *Memorial Hospital*, 415 U.S. at 285 (Rehnquist, J., dissenting); *see id.* at 288 (*Shapiro* involved "an urgent need for the necessities of life").

By definition, AFDC benefits go only to families whose resources are *less* than a minimum subsistence level set by the state. Even the maximum benefits provided to long-time California residents are insufficient to meet what the state Legislature has determined is the minimum basic standard of adequate care in the state. Cal. Welf. & Inst. Code §§ 11450, 11452, 11453 (West Supp. 1994); JA 89-90, ¶¶ 21-22. Each welfare dollar received can mean the difference between being able to pay the rent and being homeless, being able to obtain necessary medicine and going untreated for severe illness and disease.

Even those Justices who disagree that deprivations of less vital government benefits such as employment preferences rise to the level of a penalty on interstate migration have nevertheless reaffirmed that state laws do penalize migration when they deprive newcomers of "essential governmental services" as in *Shapiro*, 394 U.S. at 629-31, and *Memorial Hospital*, 415 U.S. at 258-59. *See Soto-Lopez*, 476 U.S. at 921-922 (O'Connor, J., dissenting, joined by Rehnquist, J., and Stevens, J.); *see also Zobel*, 457 U.S. at 64 n.11. The AFDC benefits withheld here are at least as vital as the nonemergency medical care in *Memorial Hospital*, 415 U.S. at 259 ("medical care is as much 'a basic necessity of life' to an indigent as welfare assistance").

The State argues that, even though AFDC is a basic subsistence payment, California's durational residency requirement does not impose a penalty on new residents because it awards them the same amount of benefits that they would have received in the state from which they moved. Pet. Br. at 10-11. This assertion is incorrect both as a matter of law and fact.

First, the State misconceives this Court's penalty analysis as a matter of law. The State suggests that a penalty should be measured by the difference between the benefits enjoyed by the migrating party in the previous state and the new state of residence. This Court's precedents, however, hold that a penalty on interstate migration is to be measured instead by the difference between the benefits new state residents receive and the benefits that longer-term state residents receive – that is, the benefits new residents would have received but for the fact of their recent migration. The baseline is what other Californians receive, *not* what new residents would have received had they remained Louisianans or Oklahomans.[25] The relevant right is to travel without "being disadvantaged because of . . . recent migration" or "otherwise being treated *differently from longer term residents.*" *Zobel*, 457 U.S. at 60 n.6 (emphasis added). The relevant examination therefore must be of how benefits are allocated within the state itself. *Cf.* n. 36, *infra*.

Once it has been determined that the nature of the sanction is of a certain significance, *see, e.g., Memorial Hospital*, 415 U.S. at 259 (nonemergency medical care); *Dunn*, 405 U.S. at 337 (right to vote), and that the classification discriminates against those who have exercised

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[25] The State asserts that the *Shapiro* and *Memorial Hospital* plaintiffs were in a worse position under the challenged statutes than they had been in their former states, and suggests that the resulting decisions in those cases turned on this point. Pet. Br. at 10-11. This assertion is baseless. This Court made no reference in those decisions to what benefits were or were not available to those plaintiffs in their former states. There was no evidence, for example, that the patient in *Memorial Hospital* received free nonemergency medical care in his previous state. As the district court noted below, "it was of no significance in *Memorial Hospital* that the nonemergency care provided by Maricopa County may have been much superior to the medical care provided elsewhere." *Green*, 811 F. Supp. at 521.

their right to migrate, the fact that the discrimination is partial rather than absolute cannot save it. It did not matter, for example, whether the medical care at issue in *Memorial Hospital* was for a serious illness or a sprained ankle, or whether the next election in *Dunn* was for the local school board or for Governor of the State. The State in each case still had to demonstrate a compelling interest for the challenged classification, which it could not do. California is withholding benefits essential to obtaining the basic necessities of life from those who exercised their right to migrate solely because of their exercise of that right. Thus it likewise must demonstrate that the law is necessary to serve a compelling state interest.

Second, the State's argument that there is no penalty here is in any event preposterous as a matter of fact. The amount that is sufficient to pay for minimal housing in Oklahoma or Louisiana or Mississippi will not begin to pay for minimal housing in California. The denial to new residents of up to 80% of the levels deemed appropriate by the state Legislature for longer-term residents in need of aid assures homelessness and destitution for new residents just as surely as a 100% denial would. As the district court found, California's statute "makes no accommodation for the different costs of living that exist in different states," 811 F. Supp. at 521, and fails to recognize that the cost of living "generally is much higher in California than elsewhere." *Id.* The State does not dispute these findings.[26] The families in the plaintiff class

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[26] The State asserts that the district court's analysis was flawed because it assumed that AFDC benefit levels were related to the standard of need in the states from which Respondents migrated, Pet. Br. at 13 n.5, and that a state's cost of living was related to its welfare payments, *id.* at 16 n.6. The district court made no such assumption nor is it necessary. The district court simply made the self-evident finding that since the cost of living generally is higher in California than elsewhere, the same grant level would not pay for as many necessities in California as it would elsewhere.

simply cannot survive in California on the limited payments that California's statute affords them. The State's claim that the California statute does not operate as a penalty on migration thus ignores the reality of economic diversity among the fifty states.[27] Homeless is homeless, whether the newcomer's AFDC grant amounts to $144 or to zero, for no family can survive in California on $144 a month. Accordingly, the California statute indisputably penalizes new state residents for their migration and therefore merits strictest scrutiny.[28]

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[27] The State also contends that it is not penalizing Plaintiffs but simply declining "to fund their move to California." Pet. Br. at 11 n.4. This, of course, is incorrect. Plaintiffs never requested funds to cover travel or moving expenses. Therefore, the State's reference to this Court's decision in *Harris v. McRae*, 448 U.S. 297, 317-318 (1980), is wholly inapposite. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983), relied upon by amicus curiae Washington Legal Foundation ("WLF"), is likewise beside the point. *Regan* upheld the denial of a tax benefit to lobbying activity, but expressly reaffirmed that "the government may not deny a benefit to a person because he exercises a constitutional right." *Id.* at 545. That is exactly what the State has done in this case. Plaintiffs claim no right to a subsidy for their move, but do claim a right not to be penalized for it. *See Maher v. Roe*, 432 U.S. 464, 474-75 & n.8 (1977) (noting that, while denying Medicaid payments for abortion is a permissible nonsubsidy, denying "general welfare benefits" to an otherwise needy woman on account of her having an abortion would be an impermissible penalty).

[28] The State has abandoned the argument in its Petition that this Court should fashion a new "undue burden" test for an infringement of the right to travel. No such test is needed here, where traditional equal protection standards have been fully workable for the last twenty-five years. Even if an undue burden analysis were applied here, however, California's law plainly imposes an undue burden on the right to travel. New residents are denied up to 80% of what longer-term residents in identical circumstances receive, and it is undisputed that that

3. The statute deters interstate migration.

Regardless of their purpose or penalizing effect, state laws are also subject to strict scrutiny if they deter persons from exercising their right to migrate between states. *See, e.g., Soto-Lopez*, 476 U.S. at 903 (plurality); *id.* at 920-21 (dissent). As this Court observed in *Shapiro*, state laws requiring indigent families to wait a year before receiving any subsistence level benefits are

> well suited to discourage the influx of poor families in need of assistance. An indigent who desires to migrate, resettle, find a new job, and start a new life will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute.

394 U.S. at 629.[29]

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margin of difference is enough to leave the new residents homeless and otherwise unable to afford the basic necessities of life.

[29] The Court specifically reaffirmed this holding in *Memorial Hospital v. Maricopa County*, where the county argued that denial of nonemergency medical care, unlike the denial of welfare, was "not apt to deter migration." This Court stated in response:

> . . . it is far from clear that the challenged statute is unlikely to have any deterrent effect. A person afflicted with a serious respiratory ailment, particularly an indigent whose efforts to provide a living for his family have been inhibited by his incapacitating illness, might well think of migrating to the clean dry air of Arizona, where relief from his disease could also bring relief from unemployment and poverty. But he may hesitate if he knows that he must make the move without the possibility of falling back on the state for medical care should his condition still plague

These effects are just as self-evident where, as here, a state grants basic assistance to families with small children that is a fraction of the minimum necessary for subsistence. In these circumstances, poor families like Plaintiffs' face enormous pressure to return to their former state of residence or to refrain from coming to California in the first place. Such deterrent effects on interstate migration are inconsistent with our political and economic Union.[30]

These deterrent effects are compounded when would-be interstate migrants flee not only poverty but also domestic violence. As amici detail, victims of domestic violence, like Plaintiffs Green, Venturella and Bertollt, frequently must move to another state for their safety and that of their children. They are often unable to move unless they can temporarily rely on public assistance to sustain their families while looking for work in the new state.

As amici further point out, because abusers often stalk victims who leave, many abused women can stop violence that continues after a separation only by moving a great distance away from the abuser. These battered women are often extremely economically vulnerable.

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him or grow more severe during his first year of residence.

415 U.S. at 257.

[30] Expert testimony below established, for example, that "historical experience suggests that when residence conditions are attached to the receipt of relief, labor mobility is impeded, and so is economic growth." JA 118. Plaintiffs' expert noted that Adam Smith severely criticized provisions restricting relief to an indigent's geographic locality because they "prevented people from searching for useful employment, and also prevented employers from finding workers." JA 116. Such restrictions were held responsible for overpopulation in areas of high unemployment, impeding the emergence of national labor markets. JA 117.

They often must flee suddenly, leaving financial resources and jobs behind. Without adequate financial assistance in their new residences, they and their children must return to the batterers or face homelessness. As this Court recognized only three Terms ago, "Many abused women who find temporary refuge in shelters return to their husbands, in large part because they have no other source of income. . . . Returning to one's abuser can be dangerous." *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2828 (1992) (joint opinion); *see generally* Brief of Amici Curiae NOW Legal Defense and Education Fund, *et al.*

Finally, these deterrent effects of the California statute are to be expected, given the State's conceded aims in designing and enacting it. In the State's waiver request to the federal government, it quite candidly stated that it expected the statute to produce a deterrent effect: "HYPOTHESIS: If California's grant levels for incoming applicants are changed to the lesser of California's computed grant amount or the maximum aid payment of the State or U.S. Territories of prior residence, the rate of relocation into California will be reduced." JA 50. And before this Court, the State specifically argues that "the effect of welfare benefits on migration is strong and significant." Pet. Br. at 21.[31] For this reason too, strict scrutiny of the California measure is required.

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[31] Ironically, the study the State now relies on concluded that there was a dramatic increase in the interstate mobility of the poor almost immediately after *Shapiro* struck down durational residence restrictions on the receipt of welfare assistance. PAUL E. PETERSON & MARK C. ROM, WELFARE MAGNETS 17 (Brookings Institution 1990). If the State's study is to be believed, therefore, the only thing it proves of relevance to this case is that durational residence requirements for the receipt of welfare assistance significantly deter migration.

B. The California Statute Fails Strict Scrutiny.

Under strict scrutiny, California must show that its discriminatory residency requirement is necessary to promote a compelling state interest. This it cannot do.

1. The alleged state fiscal interest is not compelling.

California advances only one permissible state interest in support of its residency requirement: to save money. This Court has repeatedly held that such a goal does not rise to the level of a compelling state interest. In *Shapiro*, this Court held:

> We recognize that a state has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a state may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.

394 U.S. at 633 (footnote omitted).

In *Memorial Hospital*, the Court again stated:

> . . . a State may not protect the public fisc by drawing an invidious distinction between classes of its citizens . . . , so appellees must do more than show that denying free medical care to new residents saves money. The conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes

> exercise of the right to freely migrate and settle in another State . . .

415 U.S. at 263 (citation omitted). *See Sosna v. Iowa*, 419 U.S. 393, 406 (1975) ("budgetary or recordkeeping considerations . . . insufficient to outweigh the constitutional claims.")

Contrary to the State's suggestion, Pet. Br. at 20, there is nothing exceptional about today's economic climate that suggests a need to erode basic constitutional protections and to permit discriminatory classifications where none were allowed before. To permit states "in times of stress and strain" to place themselves in positions of economic isolation would "invite a speedy end of our national solidarity." *Baldwin v. Seelig*, 294 U.S. 511, 523, 527 (1934).

California has been making the same arguments for over half a century, and even at the time of the Great Depression, this Court found them wanting:

> The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. It is not for us to say that this is not true. . . .
>
> But this does not mean that there are no boundaries to the permissible area of state legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders.

Edwards v. California, 314 U.S. 160, 173 (1941). Petitioners surely cannot claim that their fiscal rationale is more compelling now than the Court found it during the Great Depression.

2. The statute is not necessary to promote the alleged state fiscal interest.

Even if California could somehow show that conserving fiscal resources were a compelling state interest, the statute would still fail strict scrutiny because less discriminatory means were available to achieve precisely the same end. *Cf. Dunn*, 405 U.S. at 360 (holding state interest in an informed electorate "too attenuated" to justify a durational residency requirement for voting).

The State claims that the discriminatory residency requirement would save it $22.5 million annually. Pet. App. at A22, ¶ 5. The State of course could have raised revenues or cut expenditures elsewhere by an equal amount. But even assuming all these savings were to come out of the AFDC budget, they could easily have been realized without penalizing only newcomer families with identical needs to longer-term residents. Because according to the State only 6.6% of California AFDC families have resided in California for less than a year at the time they apply, the amount allegedly saved by virtue of the residency requirement represents less than one percent of the state funds California expects to spend on AFDC alone in a year. Pet. App. at A23, ¶ 2, A24, ¶ 5. The Legislature could have accomplished the same modest savings and avoided the invidious discrimination simply by making other AFDC cuts that would have had an impact on the overall AFDC budget equivalent to only 76 cents per recipient per month.[32] The State cannot show that this statute is necessary to save money given such obvious alternatives.

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[32] The 76 cents per month figure is derived by dividing the estimated annual savings of $22.5 million by the number of AFDC recipients in California (2,458,600 per month according to the State, Pet. App. at 23, ¶ 2) and then dividing by twelve. The actual monthly impact on the overall AFDC budget would be the equivalent of about a dollar and a half per recipient when federal matching funds are included. *See* Pet. App. at 21, ¶ 2.

C. Even if Strict Scrutiny Does Not Apply, The Statute Fails Rationality Review.

The State in effect concedes that California's budgetary concerns fail the compelling state interest test and argues that the Court should judge the statute by "the reasonable basis or rationality test." Pet. Br. at 18.[33] Even under rationality review, however, the California statute offends the Equal Protection Clause, as did the legislation invalidated in *Zobel*, *Hooper* and *Soto-Lopez*. There exists no rational basis for California's treatment of newer state residents as second-class citizens. While saving money is a legitimate state interest, it bears no rational relationship to the statute's distinctions between newer and older residents and among newer residents. *See, e.g., Zobel*, 457 U.S. at 61; *Shapiro*, 394 U.S. at 633 n.11; *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966) ("the Equal Protection Clause . . . require[s] that, in defining a class subject to legislation,

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[33] Amicus curiae PLF suggests a third alternative: a new ad hoc balancing test that PLF claims this Court announced in *Sosna v. Iowa*. This claim is incorrect. *Sosna* neither announced such a new test, nor even criticized the test employed in *Shapiro*, *Dunn* and *Memorial Hospital*. To the contrary, it reaffirmed those cases in distinguishing them. *Sosna*, 419 U.S. at 406.

Sosna involved a state interest far weightier than California's budgetary concerns here: namely, the State's interest in preserving its divorce judgments against collateral attack. After reviewing many reasons why the State's historic interest in the regulation of domestic relations was weightier than the state interests in the earlier cases, the Court noted the lack of less discriminatory means to further the State's objectives that were as effective as the means chosen. *Id.* at 407 n.20. The Court pointed out that a non-durational residency test was insufficient to assure the attachment to the State that application of its family laws required. *Id.* at 408; *see generally id.* at 406-09. Given the State's weaker justification and the availability of less restrictive means here, application of the *Sosna* analysis would not change the result in this case.

the distinctions that are drawn have some relevance to the purpose for which the classification is made").

First, the distinction the California statute draws between California citizens who have resided in California for less than a year and those who have resided in California for more than a year bears no rational relationship to the fiscal purpose alleged.[34] There is no reason why newcomers should bear a disproportionate share of the financial burden of ameliorating the state's fiscal problems by receiving lesser benefits than other state residents. AFDC is a need-based program and citizens who have lived in California for less than a year need food, shelter, and clothing in order to survive just as much as citizens who have lived in California for more than a year. As the district court specifically found, Plaintiffs are not better able to bear the loss of subsistence level benefits than longer term residents. *Green*, 811 F. Supp. at 523 ("This group of residents is no better able to bear the loss of benefits than a group randomly drawn."). As one legislator noted during the legislative debate:

> What we are saying to children is, if your family happened to come here from another state looking for a job, and even found a job but was then [laid] off of that job, and there is no unemployment insurance; there is no other job opportunity, and to take care of your children you must be on welfare, that somehow their stomachs are a little bit smaller than the stomach of the person who lives next door who has lived in this state over a year; that their need for clothing for a young child going to school is a little bit less than the child living across the

[34] Since the State now asserts only fiscal reasons for the residency requirement, its attempted distinction of *Zobel* as a permanent classification does not withstand analysis. If it is rational to save money on the backs of newcomers for a year, it would seem to be rational to do so permanently.

> street who may also be on welfare through no fault of that child, because the parent has been unable to find a job; that somehow that clothing will be a little bit cheaper because they will have some sort of certificate saying they haven't been here a year.

JA 37 (comments of Assemblyman Burton).[35] And as demonstrated above, California could easily save the

[35] Amicus curiae WLF argues that new residents have lesser needs because they can move more easily to less costly parts of the state. WLF Amicus Br. at 3-4, 10. This argument is baseless. There is no evidence in the record that a Mississippi grant level would cover housing anywhere in California, nor is there any evidence that Plaintiffs are better able to move than are longer-term residents. If anything, their needs were greater than those of longer-term residents both because they had the additional costs of setting up a household in a new state and because they knew far fewer people in the state who might help them.

WLF also suggests that states may pay higher benefits to longer-term residents in order to protect their "reliance interests," citing this Court's decision in *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992). This argument too is baseless. The property tax statute this Court upheld in *Nordlinger* did not single out new residents for especially harsh treatment. It allowed a higher tax rate for all new home purchases, regardless of how long the buyer had resided in the state. While a distinction between new and old home buyers rationally relates to their different expectation and reliance interests, no such differences are apposite here where the needs of all AFDC recipients are identical.

In any event, a State may not discriminate against newcomers in order to reward longer-term residents for past contributions to the public fisc. *Zobel*, 457 U.S. at 63. And welfare benefits are funded from current tax revenues "which may well be supported by the very newest arrival as well as by the long time resident," unlike capital facilities, in which longer term residents might have a greater expectation or reliance interest. *Memorial Hospital*, 415 U.S. at 286-87, 288 (Rehnquist, J., dissenting).

same amount without visiting deprivation solely on newcomers.

Second, the further distinctions the statute draws among new residents depending on their state of previous residence underscore the scheme's irrationality. The statute provides for multiple benefit levels for identically needy newcomer families. Even if the State could somehow show that new residents generally had lesser needs, there is certainly no evidence or basis to conclude that new residents migrating from Mississippi need 80% less to live in California than new residents migrating from Alaska.

California simply cannot show that the multiple distinctions made by the statute in this case among its own citizens[36] are rationally related to the fiscal purpose alleged. The utter unrelatedness of such distinctions to the fiscal purpose alleged virtually compels the conclusion that the statute must have been passed for the impermissible purpose of deterring migration. But in any event, as in *Zobel* and *Hooper*, such irrational distinctions invalidate the statute even at the level of rationality review.

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[36] *Zobel* makes clear that, contrary to the State's reasoning, the relevant comparison for equal protection purposes is among a state's own citizens. Alaska was the only state awarding oil-boom dividends. If the appropriate comparison had been of the relative entitlements of various states, as the State urges, then one of two scenarios would have ensued. Either every Alaska emigrant would have had a *Zobel*-type claim (permitting them to sue their respective new states for not awarding them comparable benefits) or no Alaska immigrant would have had a *Zobel*-type claim (if comparable benefits were not available before arriving in Alaska, then no basis exists to complain about getting too few benefits after arriving). As the Court recognized, however, the proper analysis looks to the inequality of distribution within the state and to the basis for distinctions between the state's own citizens. *Zobel*, 457 U.S. at 60-65.

II. CALIFORNIA'S STATUTE VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV BECAUSE IT DISCRIMINATES ON THE BASIS OF OUT-OF-STATE CITIZENSHIP.

The California statute also violates the constitutional guarantee that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1. The Privileges and Immunities Clause is based on a "norm of comity" that places citizens of each state "upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975) (Privileges and Immunities Clause establishes a "norm of comity" that guarantees "equality of treatment"). By guaranteeing equality of treatment to the citizens of each state when they come within the jurisdiction of another state, this guarantee seeks to "fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948); *see Baldwin*, 436 U.S. at 383 (prohibited distinctions hinder formation of a single Union); *Austin*, 420 U.S. at 660-61 (clause written with purpose of "forming a more perfect Union").

As Justice O'Connor pointed out in her separate concurrence in *Zobel*, 457 U.S. at 74-75, durational residency requirements violate the Privileges and Immunities Clause by imposing what the Court once called a "disability of alienage." *Paul*, 75 U.S. at 180. Discrimination among different classes of citizens within a state based on their length of residency in effect treats newer citizens as if they were noncitizens, classifying them "on the basis of their former residential status." *Zobel*, 457 U.S. at 75. "The fact that this discrimination unfolds after the nonresident establishes residency" does not insulate a state statute that is clearly aimed at nonresidents from scrutiny under

the Clause that was designed to protect them. *Id.* Under California's scheme, " 'the citizen of State A who ventures into [California]' to establish a home labors under a . . . disability," *id.*, and that disability is visited solely on the basis of prior out-of-state citizenship.

Like the Alaska scheme invalidated in *Zobel*, which divided the Alaska citizenry into numerous "classes of concededly bona fide residents," *Zobel*, 457 U.S. at 59, California's statute divides its citizens not only into two classes but into multiple subclasses that are defined by the state from which new residents have moved. Under the California statute, a newcomer's former state residency adheres to her for the first year that she lives in California. California thus treats some of its residents as if they were citizens of other states. For example, although the three named Plaintiffs became citizens of California upon moving to California, during their first year of residence, this statute treats Deshawn Green as if she were a Louisiana citizen by paying her according to Louisiana's AFDC plan, treats Debby Venturella as if she were an Oklahoma citizen by paying her according to Oklahoma's AFDC plan, and treats Diana Bertollt as if she were a Colorado citizen by paying her according to Colorado's AFDC plan.

The California statute thus both triggers and fails heightened scrutiny under the Privileges and Immunities Clause. First, interstate migration is plainly "sufficiently basic to the livelihood of the Nation" as to fall within the purview of the Privileges and Immunities Clause. *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64-65 (1988) (citations omitted). As Justice O'Connor observed: "It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State." *Zobel*, 457 U.S. at 76-77. And California's scheme plainly "burdens those nonresidents who choose to settle in the . . . State," *id.* at 76, because withholding a portion of AFDC sustenance payments threatens the

"means to the nonresident's livelihood." *Baldwin*, 436 U.S. at 388; *see also Shapiro*, 394 U.S. at 627 (AFDC provides dependent children the "very means to subsist").

Second, the discrimination against nonresidents here is not sufficiently related to any substantial state objective. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985). While saving money and preserving the fiscal integrity of its programs are legitimate state objectives, the distinctions made by the California statute bear no substantial relationship to these objectives. A substantial reason for such discrimination does not exist "unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed." *Hicklin v. Orbeck*, 437 U.S. 518, 525-26 (1978) (quoting *Toomer*, 334 U.S. at 398). There are no such indications here.[37] As explained in Part I.B.2 above, California's budgetary considerations are not related to the differences between new and old residents, or to the differences among residents of different states. They therefore do not justify making those distinctions. The

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[37] Although the State wisely refrains from making such a claim, amicus curiae PLF, without citation to legal or factual authority, asserts that new residents receiving AFDC are a "peculiar source" of California's budget problems. PLF Br. at 11. The evidence in the record is to the contrary. According to the State, only 6.6% of California's AFDC families resided in another state in the previous year, and of those, only half were even on AFDC in the states from which they migrated. JA 29, 83-84, A24 ¶ 5. In fact, a greater percentage of children on AFDC in California are natives than are children in California generally. JA 23 ("85% of children receiving AFDC were born in California – while only 75% of California children are natives. ([1984] report of the non-partisan Legislative Analyst).") (typographical error in Joint Appendix). As amicus curiae National Welfare Rights & Reform Union points out, the rise in AFDC caseloads is a national phenomenon related to changes in the economy and in family composition, not to the interstate migration of indigents.

State's fiscal ends could be served as readily by nondiscriminatory means.

Categorizing newcomers according to their prior state of residence is an affront to the Privileges and Immunities Clause. It goes a step beyond failing to treat noncitizens as if they were citizens; it fails to treat citizens as the citizens that they are. As the district court observed: "If this durational residency requirement were valid, then so would a measure limiting new residents to the same level of medical, educational, police, and fire services they received in the state of prior residence." *Green*, 811 F. Supp. at 522. Permitting this type of disparity in treatment, which varies according to the availability of government benefits and services in a citizen's prior state of residence, leads to absurd results wholly at odds with the conceptual foundations of our country.[38] Because the California statute treats newer citizens as if they were citizens of some other state, and proceeds to deprive them of crucial subsistence assistance on that basis, it offends the Privileges and Immunities Clause.[39]

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[38] For example, someone who moved to California from Nebraska, which has a unicameral state legislature, could be prohibited from voting for the state senate, because she could not vote for a state senate when she was in Nebraska. Similarly, someone who moved to California from Massachusetts could be prohibited from purchasing alcohol on Sundays, because Massachusetts' "blue laws" prohibit the sale of liquor on Sundays. Finally, anyone who moved to New Hampshire from another state could be required to pay her prior state's sales tax rate on all purchases, even though New Hampshire itself has no sales tax, because every other state levies a sales tax.

[39] Amicus curiae WLF urges the Court to analyze this case under the dormant Commerce Clause. WLF Br. at 8-9. Of course Commerce Clause analysis would not erase the violations of Equal Protection, right-to-travel or Privileges and Immunities rights here, none of which are waivable by Congress. But even under Commerce Clause analysis, the California statute is plainly unconstitutional, absent express congressional authorization, because it is facially discriminatory. Apparently recognizing this, WLF argues that the HHS waiver approval was sufficient to authorize the California statute under the Commerce Clause. WLF Br. at 9. Even if that approval had not been vacated by the Ninth Circuit in *Beno*, mere federal administrative approval is not a substitute for the express congressional authorization that is required to validate state measures that otherwise would violate the Commerce Clause. *See Maine v. Taylor*, 477 U.S. 131, 138-40 (1986); *South Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 88-93 (1984).

III. THIS CASE DOES NOT PRESENT A LIVE CASE OR CONTROVERSY IN LIGHT OF *BENO V. SHALALA*.

The California durational residency requirement only became operative upon approval by the federal government. *See* pp. 7-9, *supra*. As the State has acknowledged in its Petition for Writ of Certiorari, Pet. at 5 n.4, and now in its Brief on the Merits, "[o]n July 13, 1994, the Ninth Circuit vacated the waivers necessary to implement the provisions of this section." Pet. Br. at 5 n.3 (citing *Beno v. Shalala*). Although the State submitted a new waiver request, the Secretary of HHS has not approved it.

Once the Ninth Circuit vacated the waiver authorizing the reduction in assistance levels mandated by the residency requirement, the requirement itself ceased to exist. Even if constitutional, the State can no longer enforce the requirement against the plaintiff class. This case is therefore moot. *Kremens v. Bartley*, 431 U.S. 119, 127-29 (1977). *See* Respondents' Brief in Opposition to Petition for Certiorari at 19-21.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed or alternatively, the case should be dismissed as moot.

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Respectfully submitted,

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